IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs January 30, 2007

RICKY JEROME HARRIS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Carter County
No. S16982 R. Jerry Beck, Judge

No. E2005-00566-CCA-R3-PC - Filed December 3, 2007

Petitioner, Ricky Jerome Harris, filed a petition for writ of error coram nobis. He based his petition on two items of allegedly newly discovered evidence, the first being an anonymous letter, which included a copy of previously undisclosed interview notes with a potential alibi witness, and the second being a letter, signed with the name "Bill," confessing to the killing of the victim. Petitioner also filed a petition for relief requesting DNA analysis on certain pieces of evidence. The lower court summarily dismissed the writ of error coram nobis claims because they did not involve newly discovered evidence. The lower court ruled Petitioner had prior knowledge of the alibi witness because he had aided her when she had car trouble and because Petitioner raised the "letter from Bill" in a previous post-conviction petition. The lower court summarily dismissed the DNA petition finding it was not a proper claim for writ of error coram nobis relief. We conclude: (1) that the lower court erred in summarily dismissing the petition with regard to the alibi witness, and we remand for a hearing; (2) that the lower court was incorrect in summarily dismissing the petition for writ of error coram nobis with regard to the "letter from Bill," and we remand for a hearing; and (3) we affirm, on other grounds, the lower court's dismissal of Petitioner's request for DNA testing. Therefore, we affirm in part, reverse in part and remand for further proceedings by the lower court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed in Part, Reversed in Part, and Remanded.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and J. CURWOOD WITT, JR., J., joined.

Sonya Slaughter Helm, Bristol, Tennessee, for the appellant Ricky Jerome Harris

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Joe Crumley, District Attorney General and Kenneth C. Baldwin, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

A jury convicted Petitioner of first degree murder for the death of his mother-in-law, Dolly Gouge. *State v. Ricky Jerome Harris*, No. 85, 1990 WL 171507, at *1 (Tenn. Crim. App., at Knoxville, Nov. 8, 1990), *appl. to appeal denied*, (Tenn. Feb. 4, 1991). He received a life sentence as a result of the conviction. *Id.* Petitioner appealed his conviction and sentence to this Court, which affirmed both his conviction and his sentence. *Id.* at *25. In 1992, Petitioner filed a petition for post-conviction relief. *Ricky Harris v. State*, No. 03C01-9611-CR-00410, 1998 WL 191441, at *1 (Tenn. Crim. App., at Knoxville, April 23, 1998), *perm. app. denied*, (Tenn. Dec. 7, 1998). After several hearings, the post-conviction court denied post-conviction relief in 1996. *Id.* Petitioner presented two issues for review in his appeal from the denial of post-conviction relief: "(I) whether the post-conviction court erred by ruling that any failure on the part of the State to provide exculpatory evidence to the petitioner in advance of trial did not warrant setting aside the conviction; and (II) whether the post-conviction court erred by finding that the petitioner received the effective assistance of counsel." *Id.* On appeal, this Court affirmed the denial of post-conviction relief.

On December 10, 1998, Petitioner filed a motion to reopen his petition for post-conviction relief based upon the State's alleged failure to disclose exculpatory evidence. *Harris v. State*, 102 S.W.3d 587 (Tenn. 2003). Petitioner alleged that the State failed to disclose the identity of a witness who was interviewed by an officer during the investigation of the case. *Harris*, 102 S.W.3d at 589. The post-conviction court denied the motion because Petitioner failed to state a cognizable ground for reopening the petition, and he failed to attach sworn affidavits supporting his position. *Id.* Petitioner then filed a sworn affidavit of the witness in question. *Id.* at 590. The post-conviction court again denied Petitioner's motion. *Id.* Petitioner appealed to this Court.

In an order filed December 4, 2001, this Court determined that Petitioner's motion to reopen his petition for post-conviction relief should be treated as a writ of error coram nobis. *Id.* This Court remanded the case to the post-conviction court for a hearing. The State appealed the order to the Tennessee Supreme Court. *Id.* Our supreme court held that this Court was correct in determining that Petitioner did not state a cognizable ground for reopening his petition. However, our supreme court also stated that this Court erred in sua sponte treating Petitioner's motion to reopen his petition for post-conviction relief as a writ of error coram nobis, and the supreme court reinstated the post-conviction court's dismissal of the motion. *Id.* at 594.

On March 11, 2004, Petitioner filed a petition for writ of error coram nobis. In this petition, he argued that the State violated his constitutional rights by withholding information regarding a potential alibi witness and letters written by "Bill" confessing to the victim's murder. On September 9, 2004, Petitioner filed a motion requesting forensic DNA analysis on evidence presented at his trial. In an order filed February 8, 2005, the trial court summarily dismissed Petitioner's request for a writ of error coram nobis. On February 11, 2005, the trial court entered an amended judgment dismissing the request for DNA testing. Petitioner timely filed a notice of appeal.

ANALYSIS

Writ of Error Coram Nobis

On appeal, Petitioner argues that the trial court erred in dismissing his petition on the grounds that: (1) Petitioner had knowledge of the existence of a potential alibi witness before trial even though that witness's statement was not supplied by the State; (2) he received the alleged confession letters written by "Bill" during his direct appeal; and (3) Petitioner had previously raised the issue of the letters from Bill in his post-conviction petition. Petitioner also argues that the trial court erred in summarily dismissing his petition. The State argues that the trial court correctly dismissed the petition.

Relief by petition for writ of error coram nobis is provided for in T.C.A. § 40-26-105. That statute provides, in pertinent part:

> The relief obtainable by this proceeding shall be confined to errors dehors the record and to matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding. Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial. The issue shall be tried by the court without the intervention of a jury, and if the decision be in favor of the petitioner, the judgment complained of shall be set aside and the defendant shall be granted a new trial in that cause.

T.C.A. § 40-26-105(b). The writ of error coram nobis is an "extraordinary procedural remedy, 'filling only a' slight gap into which few cases fall." *State v. Mixon*, 983 S.W.2d 661, 672 (Tenn. 1999). The "purpose of this remedy 'is to bring to the attention of the court some fact unknown to the court which if known would have resulted in a different judgment.'" *State v. Hart*, 911 S.W.2d 371, 374 (Tenn. Crim. App. 1995) (quoting *State ex rel. Carlson v. State*, 407 S.W.2d 165, 167 (1966)). The decision to grant or deny a petition for writ of error coram nobis rests within the sound discretion of the trial court. *Teague v. State*, 772 S.W.2d 915, 921 (Tenn. Crim. App. 1988), *overruled on other grounds by*, *Mixon*, 983 S.W.2d at 671 n.3. Therefore, our review is confined to an abuse of discretion standard.

A petition for writ of error coram nobis must relate: (1) the grounds and the nature of the newly discovered evidence; (2) why the admissibility of the newly discovered evidence may have

resulted in a different judgment had the evidence been admitted at the previous trial; (3) that the petitioner was without fault in failing to present the newly discovered evidence at the appropriate time; and (4) the relief sought by the petitioner. *Hart*, 911 S.W.2d at 374-75. To be successful on a petition for a writ of error coram nobis, our supreme court recently held that "the standard to be applied is whether the new evidence, if presented to the jury, *may have* resulted in a different outcome . . . ." *State v. Vasques*, 221 S.W.3d 514, 526 (Tenn. 2007) (emphasis added).

A petition for writ of error coram nobis must usually be filed within one year after the judgment becomes final. *See* T.C.A. § 27-7-103; *Mixon*, 983 S.W.2d at 670. It has been determined that a judgment becomes final, for purposes of coram nobis relief, thirty days after the entry of the judgment in the trial court if no post-trial motion is filed, or upon entry of an order disposing of a timely-filed, post-trial motion. *Mixon*, 983 S.W.2d at 670. The one-year statute of limitations may be tolled only when necessary not to offend due process requirements. *Workman v. State*, 41 S.W.3d 100, 103 (Tenn. 2001).

Alibi Witness

In the case sub judice, Petitioner became aware of the alibi witness through a letter he received in response to a newspaper advertisement he placed in August of 1998 requesting any information regarding the disappearance and murder of his mother-in-law. The letter, written anonymously, stated that the writer is a family member of Bill Crumley, who was the sheriff at the time of the investigation into the victim's death. According to the letter, the sheriff had shown the letter writer some papers connected with the investigation of Petitioner's case. This had occurred at the sheriff's house. The letter writer later obtained a copy of one document, but could not find the others. The document enclosed with the letter contained notes written on October 7, 1987, by an anonymous person. The notes contain information about an interview conducted with Connie Hampton. The notes state that Connie Hampton and Annie Golden are aunt and niece. Next to their names are phone numbers and addresses. The following is also included, "Family members- Car trouble on 19E Hampton at {8:25 a.m.} 9-8-87; Harris's assist-they saw inside the car/trunk when he removed tools; Saw nothing backseat/trunk followed Harris to Sherwood for minor repairs; First Contact."

When Petitioner received this letter in the fall of 1998, he attempted to reopen his post-conviction petition. Petitioner filed a petition for writ of error coram nobis with an attached affidavit from Ms. Hampton. This affidavit states that Ms. Hampton and her niece were on a mini-vacation in September 1987 when her car stopped running. A man stopped to help her. The affidavit contains a description of the man and the car. The affidavit states:

> 6. During the time that I was with the man at his car, I was able to see the inside of the car as well as inside the trunk. I certainly did not see a body.
> 7. Sometime later, I was contacted by a policeman. He asked if I was the lady that had car trouble on Highway 19E and went to Sherwood Chevrolet. I told him that

> I didn't know the name of the road, but I described the road to him. He said he had the papers from Sherwood where they fixed my car. I told him about the man that helped us. He asked me if I saw a dead body in the car. He said I would have to come to court to testify.

In its order, the trial court stated that Petitioner was not entitled to relief on the issue of the alibi witness because Petitioner had "acute knowledge of the existence of such a witness at the time of his trial." The trial court included parts of both our supreme court's opinion on the appeal from his motion to reopen his post-conviction petition and this Court's opinion on the direct appeal to support its conclusion.

The lower court included material from Petitioner's direct appeal to this Court which essentially stated that Petitioner went to the victim's house to collect some of his belongings and drove directly to his place of employment, arriving at approximately 9:00 a.m. *Ricky Jerome Harris*, 1990 WL 171507, at *5. The trial court also quoted the following footnote from the majority opinion of our supreme court's opinion to support its reasoning:

> While we reserve this question for another day, we feel compelled to point out in response to the dissenting opinion that the threshold inquiry in the *Burford* due process analysis is whether a petitioner has alleged a "later-arising" prima facie claim which will be precluded by strict application of the statute of limitations. *See, e.g.*, *Burford*, 845 S.W.2d at 209; *Sands v. State*, 903 S.W.2d 297, 301 (Tenn. 1995). In this case, the evidence upon which Harris relies does not appear to be "newly discovered" nor does Harris appear to be "without fault" in failing to previously present it. As the State points out, if the allegations are true, at 8:30 a.m. on the day the victim disappeared, Harris stopped along the roadside and rendered assistance to a stranded motorist. Harris apparently searched his trunk for the appropriate tools, tightened the fan belt on the motorist's car, and started the car. Throughout these activities, the motorist accompanied Harris, allegedly observing his actions as well as the trunk and interior of his car. Therefore, if the allegations are true, Harris was acutely aware of the existence of the stranded motorist prior to his initial trial. Moreover, Harris appears to be at fault in failing to previously present this evidence prior to trial since he failed to disclose her existence and gave a statement to police indicating that he drove directly from the victim's home to his work place on the morning of the victim's disappearance. Thus, the evidence upon which Harris relies does not appear to be subsequently or newly discovered, and *Harris does not appear to be "without fault" in failing to previously present this evidence.* Therefore, accepting for the sake of argument the dissent's proposition that the *Burford* due process analysis applies in this case, Harris would not be entitled to relief from the one-year statute of limitations. Indeed, it would not be necessary for a court to engage in the balancing portion of the analysis because the proof upon which Harris

> relies does not appear to state a prima facie later-arising claim under the writ of error coram nobis statute.

Harris, 102 S.W.3d at 594 n.10.

The State argues that the statute of limitations should not be tolled because Petitioner has not shown that the evidence is newly discovered nor has he shown that he is without fault in presenting the claim earlier. This is the same analysis included in footnote 10 of the majority opinion in our supreme court's decision. As noted above, the trial court also relied upon this footnote to determine whether the one-year statute of limitations should be tolled.

We point out that this language was in a footnote and not in the body of the opinion. In addition, the language of the footnote shows that the supreme court reserved decision on the merits of the statute of limitations question. In *Black's Law Dictionary*, obiter dictum is defined as:

> Words of an opinion entirely unnecessary for the decision of the case. *Noel v.Olds*, 78 U.S. App. D.C. 155, 138 F.2d 581, 586. A remark made, or opinion expressed by a judge, in his decision upon a cause, "by the way," that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument. Such are not binding as precedent.

Black's Law Dictionary 1072 (6th ed. 1990). In Tennessee, obiter dictum "does not constitute binding precedential authority under the doctrine of stare decisis." *Messer Griesheim v. Cryotech of Kingsport*, 131 S.W.3d 457, 466 (Tenn. Ct. App. 2003).

In the supreme court's opinion, the issues addressed were whether this Court properly held that the suppression of exculpatory evidence was not a sufficient ground to reopen a petition for post-conviction relief, and whether this Court could sua sponte treat Petitioner's petition to reopen his post-conviction petition as a writ of error coram nobis. *Harris*, 102 S.W.3d at 590-91. Our supreme court specifically chose not to address whether Petitioner would be successful on any subsequently filed writ of error coram nobis when it dismissed Petitioner's petition to reopen his post-conviction petition. This is demonstrated by the fact that the footnote's first sentence is, "While we reserve this question for another day . . . ." *Id.* at 594 n.10. Therefore, the contents of the footnote are obiter dictum.

In *Burford v. State*, 845 S.W.2d 204 (Tenn. 1992), our supreme court held that a statute of limitations may be tolled in the face of due process concerns. In *Burford*, the private interest at stake was the accused's opportunity to attack his conviction and incarceration on the grounds that he was

deprived of a constitutional right via a post-conviction petition. 845 S.W.2d at 205. The defendant argued that his constitutional rights under the Eighth Amendment were violated because his sentence was excessive due to its enhancement to the range for a persistent offender based on convictions that were later set aside. *Id.* at 206. The court in *Burford* determined, after weighing the competing interests in that case, that the accused's interest in mounting a constitutional attack upon his conviction and incarceration outweighed the State's interest in preventing the litigation of stale and groundless claims. *Id.* at 209.

Specifically, the *Burford* court recognized that "before a state may terminate a claim for failure to comply with procedural requirements such as statutes of limitations, due process requires that potential litigants be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner" and that, "it is possible under the circumstances of a particular case, application of the statute may not afford a reasonable opportunity to have the claimed issue heard and decided." *Id.* at 208. In determining what sort of opportunity is "reasonable," the court concluded that "[i]dentification of the precise dictates of due process requires consideration of both the governmental interests involved and the private interests affected by the official action." *Id.* at 207.

The due process tolling of a statute of limitations when there are later arising circumstances was extended to writ of error coram nobis cases in *Workman v. State*, 41 S.W.3d 100 (Tenn. 2001). In *Workman*, the Tennessee Supreme Court reviewed a case in which the petitioner was denied a hearing on his petition for writ of error coram nobis because the statute of limitations for filing had passed. Similar to the case herein, Workman sought coram nobis relief based on claims that new evidence, unavailable during his trial, would show that he was actually innocent of capital murder. The supreme court found that, in a variety of contexts, "due process may require tolling of an applicable statute of limitations." 41 S.W.3d. at 103. The *Workman* court relied, in large part, on the due process considerations discussed in *Burford*. *Id.* at 102. Using the balancing test from *Burford*, the court in *Workman* weighed the governmental interests involved against the private interests affected by the official action and decided that, if the procedural time bar was applied, Workman could have been put to death without receiving an opportunity to have the merits of his claim evaluated by a court of this State. *Id.* at 103.

In other words, the court determined that due process precludes application of the statute of limitations to bar consideration of a petition for writ of error coram nobis in cases where the defendant's interest in obtaining a hearing to present newly discovered evidence, which may establish actual innocence, far outweighs any governmental interest in preventing the litigation of stale claims. *Id.* The supreme court concluded that Workman was entitled to a hearing to evaluate the claims contained in his petition for writ of error coram nobis, notwithstanding the fact that he filed his petition thirteen months after discovering the newly discovered evidence. *Id.* In considering the delay, the court remarked that the time within which Workman's petition was filed did not exceed the reasonable opportunity afforded by due process, especially in cases such as Workman's where the evidence at issue may show actual innocence of a capital offense. *Id.* at 103-04.

Contrary to *Workman*, Petitioner's case does not involve a capital offense. However, this Court has applied the doctrine set forth in *Workman* to non-capital cases. *See Freshwater v. State,* 160 S.W.3d 548 (Tenn. Crim. App. 2004); *State v. Ratliff*, 71 S.W.3d 291, 296-97 (Tenn. Crim. App. 2001). This Court has found that a sentence of ninety-nine years, in *Freshwater*, and twenty-four years without parole, in *Ratliff*, were sufficient to trigger application of a due process analysis. *Freshwater*, 160 S.W.3d at 557; *Ratliff*, 71 S.W.3d at 297. Likewise the life sentence in this case is a sufficiently significant period of time to warrant a due process analysis despite the lapse of the statute of limitations.

In this case, the statement of the alibi witness would be exculpatory if it is true. According to the State's timeline at trial, Petitioner would have been helping the witness with her car trouble at the same time he would have been transporting the victim's body. The witness stated that she saw inside both Petitioner's trunk and car and did not see a body. She then followed him to his place of work. The information is both favorable and material. This witness's statement is in direct opposition to the State's timeline at trial. If what the witness stated is true, the timeline presented by the State at trial would be called into question.

If Petitioner's allegations are taken as true, it appears that the tolling of the statute of limitations might be supported based upon a due process analysis. Therefore, we reverse and remand for a hearing to determine whether there was a due process violation sufficient to toll the statute of limitations where the State failed to turn over the discovery notes of the interview of Ms. Hampton. If the lower court finds that the statute of limitations should indeed be tolled, the lower court should hold a hearing upon the merits to determine whether the alibi evidence is credible and may have changed the jury's verdict.

Letter from "Bill"

On June 13, 1991, the district attorney's office sent a letter to Petitioner's trial counsel with an attached letter from someone named "Bill" with a notation that she might find the letter exculpatory. In this letter, Bill confessed to killing the victim. The letter did not include any other name or address. In his post-conviction petition, Petitioner alleged that the State suppressed this evidence and violated his due process rights under *Brady v. Maryland*. *Ricky Harris*, 1998 WL 1911441, at *10. On appeal from the post-conviction court's denial, this Court held that there was no *Brady* violation. *Id.* The district attorney testified at the post-conviction hearing and stated that he did not receive the letter before trial. The post-conviction court specifically stated that it found the district attorney's testimony to be "absolutely truthful." *Id.* This Court held that the fact that the district attorney's office did not have the letter before trial precluded the State from being held to a disclosure requirement. *Id.*

In his petition for writ of error coram nobis, Petitioner argues that he has newly discovered evidence in this letter in conjunction with documentation he received from a federal defender investigator and conclusions of a handwriting analyst. In April of 2001, Petitioner received the

"fruits of an investigation into the activities of ex-Carter County Deputy William Foster." He states in his petition that the handwriting analyst concludes that Mr. Foster's handwriting matches that of the letter writer. Petitioner obtained the handwriting analysis report in June of 2002. On appeal, Petitioner argues that this evidence was not admissible as evidence until he received both the documents from the federal investigator and the handwriting analysis. Therefore, the evidence did not become "newly discovered" until he received this information.

The lower court made the following findings with regard to this issue:

> Clearly, the "Letter to Bill" [sic] issue and the alleged fact that it might point to another suspect was an issue at the time of the Post Conviction hearing. Further, it was revealed that the "Bill" letter was turned over to original trial counsel prior to the completion of the original direct appeal from conviction.
>
> Further, the matter as pled would be barred by the Statute of Limitations. *Mixon*, 983 SW2d 669 [sic] and T.C.A. § 27-7-103.

The report of the handwriting analysis was attached as an exhibit to Petitioner's pleadings. The report states that Petitioner requested the handwriting analyst to make two determinations, "[d]etermine whether Ricky Harris (Exhibit K-2) did, or did not, write the questioned letters (Exhibit's [sic] Q-1 through Q-3). Determine whether the questioned letters (Exhibits Q-1 through Q-3) are simulated forgeries, intended to duplicate the hand printing of Ricky Harris." Unfortunately, the exhibit to the pleadings does not include a list or copies of the letters Q-1 through Q-3. Therefore, we cannot determine whether any of the letters presented to the analyst were included with the documentation received from the federal defender investigator and actually written by Mr. Foster to be compared to the letter written by "Bill." However, we do know that the two questions presented to the analyst concerned whether Petitioner wrote the letters in question, as opposed to whether Mr. Foster wrote the letters. In addition, we are unable to locate any statement in the report that Mr. Foster was the writer of the letter.

Petitioner asserts that this handwriting analysis constitutes newly discovered evidence that Mr. Foster wrote the "Letter from Bill." However, we are unable to conclude from the exhibits presented by Petitioner with his petition whether the handwriting analyst determined that Mr. Foster did or did not write the letter in question. The report does contain a clear statement that Petitioner was not the writer of the letter, but this would not constitute proof of Petitioner's innocence of the crime.

For this reason, we conclude that the record is insufficient for this Court to determine whether the letter and additional documentation would constitute newly discovered evidence. Therefore, we reverse the lower court's decision with regard to this issue and remand for a hearing to determine whether due process considerations warrant the tolling of the statute of limitation for

coram nobis review. In this hearing, the lower court must determine whether Petitioner has sufficient evidence to prove that Mr. Foster wrote the letter in question. If the lower court determines that the addition of the handwriting analysis report and the documents regarding Mr. Foster constitute newly discovered evidence, then a hearing on the merits of the coram nobis petition should be held.

DNA Evidence

On September 9, 2004, Petitioner also filed a petition requesting forensic DNA analysis. The lower court entered an order February 11, 2005, dismissing Petitioner's petition because a "Motion for a Writ of Error Coram Nobis is not a proper vehicle for seeking DNA testing." However, Petitioner stated in his petition that he was requesting relief pursuant to T.C.A. § 40-30-301 and cited to the "Post Conviction DNA Analysis Act of 2001." Petitioner argues in his brief that the lower court erred in dismissing his petition because he asked for this relief not through a writ of error coram nobis, but instead through the Post-Conviction DNA Analysis Act. The State argues that the lower court was correct in dismissing the petition as not proper for relief under a writ of error coram nobis, but also argues that Petitioner is not entitled to relief under the Post-Conviction Act.

It is apparent from both the heading and the substance of the petition that Petitioner filed his petition for DNA analysis as a petition under the DNA Post-Conviction Act. Under T.C.A. §§ 40-30-304 and -305, a post-conviction court may order DNA analysis if the post-conviction court finds four factors. T.C.A. § 40-30-304(1) requires that the post-conviction court find that "[a] reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis . . . ." T.C.A. § 40-30-305(1) requires that the post-conviction court find that "[a] reasonable probability exists that analysis of the evidence will produce DNA results which would have rendered the petitioner's verdict or sentence more favorable if the results had been available at the proceeding leading to the judgment of conviction . . . ." The remaining three factors are identical for both sections:

> (2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;
>
> (3) the evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and
>
> (4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

T.C.A. §§ 40-30-304(2)-(4) & -305(2)-(4).

When this Court reviews a post-conviction court's decision determining whether to grant relief under the Post-Conviction DNA Act, the lower court is afforded considerable discretion and our scope of review is limited. *Sedley Alley v. State*, No. W2006-00179-CCA-R3-PD, 2006 WL 1703820, at *5 (Tenn. Crim. App., at Jackson, June 19, 2006) (citing *Sedley Alley v. State*, No. W2004-01204-CCA-R3-PD, 2004 WL 1196095, at *3 (Tenn. Crim. App., at Jackson, May 26, 2004), *perm. app. denied*, (Tenn. Oct. 4, 2004)); *Raymond Roger Jones v. State*, No. E2003-00580-CCA-R3-PC, 2004 WL 2821300, at *6 (Tenn. Crim. App., at Knoxville, Dec. 3, 2004), *perm. app. denied*, (Tenn. Mar. 21, 2005) (citing *Willie Tom Ensley v. State*, No. M2002-01609-CCA-R3-PC, 2003 WL 186647, at *3 (Tenn. Crim. App., at Nashville, Apr. 11, 2003)). Prior opinions of this Court on direct appeal, as well as appeals from prior post-conviction petitions or habeas corpus petitions, may be considered by the trial court in reaching its decision. *Sedley Alley*, 2006 WL 1703820, at *5. In addition, "[a] determination of the evidence and surrounding circumstances is necessary to evaluate whether exculpatory results would have prevented prosecution or conviction or would have resulted in a more favorable verdict or sentence." *State v. David I. Tucker*, No. M2002-02602-CCA-R3-CD, 2004 WL 115132, at *2 (Tenn. Crim. App., at Nashville, Jan. 23, 2004). The evidence considered by the lower court may include "the evidence presented at trial and any stipulations of fact made by either party." *Sedley Alley*, 2006 WL 1703820, at *5.

The items of evidence with which the Petitioner is concerned are an upper denture plate, a lower denture plate, a hair sample found in Petitioner's car, 200 hair rollers taken from the victim's house, and human hand bones that were identified as the victim's. At trial, the State provided evidence to support the conclusion that remains found near Carr Cemetery were that of the victim. In his petition to the lower court, Petitioner's argument centers on the identification of the remains as the victim. Our initial question is whether exculpatory evidence from DNA testing of the items in question would have made it a reasonable probability that Petitioner would not have been convicted or had a more favorable result at trial.

In *Sedley Alley*, we stated that:

> The [Post-Conviction DNA] Act's reach is limited to the performance of DNA analysis which compares the petitioner's DNA to samples taken from biological specimens gathered at the time of the offense. The statute does not authorize the trial court to order the victim to submit new DNA samples years after the offense, nor does the statute open the door *to any other comparisons the petitioner may envision*.

Sedley Alley, 2006 WL 1703820, at *9 (emphasis added). In the case at hand, Petitioner is asking the Court to compare DNA results between evidence found at the victim's house and evidence found at the site where the body was found. There is no request for comparison between DNA derived from Petitioner and other biological specimens collected at the time of the offense. It appears that under *Alley*, this is not an appropriate request for DNA testing.

Even if appropriate under the Act, we are not convinced that a test demonstrating that the human remains were not that of the victim would lead to a different result based upon the evidence presented at trial. There was a great deal of circumstantial evidence and motive presented at trial connecting Petitioner to the victim's disappearance. *See Harris*, 1990 WL 171507, at *1-7.

In addition, evidence was presented at trial identifying the remains found at the cemetery. There was testimony that the upper denture plate was found at the site of the body, while a lower denture plate was found at the victim's house. Hair rollers containing hair matching that of the victim were also found at the site of the remains. More importantly, a flowered robe the victim had been wearing the morning of her disappearance, as well as, the mate to a shoe found in the flowerbed at the victim's house were found with the remains. In addition, there was evidence that the "decayed body had been dismembered by animals and only portions of the skeleton were found." This Court has previously stated:

> While the identity of the body is an essential element of the corpus delicti in Tennessee, it may be proved by circumstantial evidence, especially where that is the best proof attainable. *Bolden v. State*, 140 Tenn. 118, 203 S.W. 755 (1918). Identification of a decomposed, burned, or mutilated body, or portion thereof, is frequently established by evidence showing a similarity between the physical characteristics of the remains and of the victim, coupled with evidence that the clothing, or fragments thereof, found on or near the remains was the same as, or similar to, clothing worn by the victim. 86 A.L.R.2d [H]omicide-Identification of Victims 10(h) p. 771, 2; *Lancaster v. State*, 91 Tenn. 267, 18 S.W. 777 (1892). Circumstantial evidence of the identity of a body may be found in the correspondence of peculiar physical characteristics, or in clothing, or articles found in connection with the remains. 41 C.J.S. Homicides 313, pp. 23, 24. *Cathey v. State*, 191 Tenn. 617, 235 S.W.2d 601 (1950).

Berry v. State, 523 S.W.2d 371, 374 (Tenn. Crim. App. 1974).

Considering the decomposition and dismemberment of the body, as well as the site's proximity to a cemetery, it is unlikely that exculpatory evidence from DNA testing would have resulted in a different result. There was sufficient evidence found at the site to identify the remains as that of the victim, namely, the robe and the shoe. In addition, DNA identification of the denture plate and hand bones found at the site as someone other than the victim would not have ruled out Petitioner as the perpetrator.

Petitioner also requested testing regarding a hair found in the trunk of his car. There is not a reasonable probability that Petitioner would have had a more favorable result if this hair was found not to be the victim's. As we stated above, there was overwhelming circumstantial evidence, and there was sufficient evidence to identify the body at the site. The discovery that one hair found in

Petitioner's car was not actually that of the victim would not be sufficient to counter the overwhelming circumstantial evidence.

Petitioner cannot meet the first requirement under T.C.A. § 40-30-304(1) and 40-30-305(1) that a reasonable probability exists that he would have had more favorable results. Therefore, all four factors cannot be found under the Post-Conviction DNA Act for relief with regard to any of the items he has requested to be tested. For this reason, we affirm the lower court's dismissal of his petition on other grounds.

CONCLUSION

For the foregoing reasons, we reverse the trial court's determination with regard to the alibi witness and the "Letter from Bill," and we remand for a hearing to determine whether the statute of limitations should be tolled with regard to both the alibi witness and the letter. We affirm the lower court's dismissal of the petition for post-conviction relief under the Post-Conviction DNA Act, for the reasons stated in this opinion.

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JERRY L. SMITH, JUDGE